
U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C 20001-8002

CASE NO.: 91-ERA-4

In the Matter of

LINDA PORTER,
Complainant,

v.

BROWN & ROOT, INC., and
TEXAS UTILITIES,
Respondents.

ORDER

On April 13, 1992, Respondents filed a Joint Motion to Compel attendance of Emilio Longoria and Sam Keeling for discovery depositions, and for sanctions. Although it appears that Respondents, via subpoena, gave Messrs. Longoria and Keeling fifteen days and seventeen days notice, respectively, of depositions scheduled for April 7 and 8, 1992, Respondents were unable to depose the witnesses because of the witnesses, failure to attend the depositions. Respondents submit that such failure was the result of instructions from the witnesses, counsel, Mr. David Leibowitz.

On or about April 16, 1992, Mr. Leibowitz telephoned me and, after identifying himself as counsel for witnesses Longoria

---

and Keeling, advised that due to his representation of an enormous number of clients in other proceedings arising from their employment with Respondents, he had been unable to attend the depositions in question and for that reason had instructed his clients not to attend. He offered that his intent in calling was to assure this office that such instructions were the result of his inability to be present at the depositions, not the result of a lack of

respect for this office. I instructed him to submit such statement by letter with copies to counsel for the parties. Attached is a photocopy of a letter from Mr. Leibowitz, sent to my office by facsimile transmission. What is not contained therein, is his telephone statement that Respondents often simultaneously schedule depositions, involving his clients in different claims, at two or more locations.

The rules of practice and procedure in whistleblower actions before the Office of Administrative Law Judges are codified at 29 C.F.R. Parts 24 and 18, respectively. Twenty-nine C.F.R. § 18.22(c) requires not less than five days written notice for the taking of a witness's deposition within the continental United States.

Given that Respondents clearly gave adequate notice by scheduling the depositions fifteen and seventeen days in advance, the better course of action would have been for Mr. Leibowitz to have timely voiced his objections to the time and place designated for the depositions. However, what would appear to be a blatant disregard for the subpoenas issued in this matter is somewhat mitigated by the statements contained in Mr. Leibowitz's letter. Specifically, it appears that this legal complication could have been avoided with the placing of a single telephone call, regarding an agreeable time and place for deposing the witnesses, by Respondents to Mr. Leibowitz prior to "noticing" the parties.

While it is imperative that all parties have a reasonable opportunity to develop and present the evidence in support of their respective positions, there is an inherent obligation on counsel, as officers of the court, to avoid, where practical, actions that will impede the resolution process. It is my perception that this legal complication and, more importantly, additional delay of the completion of discovery has been occasioned both by Respondents' counsel's failure to attempt to obtain a mutually agreeable deposition date prior to issuing the

---

notice of deposition, and by Mr. Leibowitz's failure to timely inform counsel for Respondents of his inability to attend the depositions of his clients.

I am not sympathetic to Mr. Leibowitz's inability to timely attend to such matters due to the number of his clients. This impediment could have been avoided by his taking of fewer cases or by the employment of additional staff. In any event, Mr. Leibowitz's choice shall not in any way compromise Respondents' opportunity to develop their evidence.

Likewise, to avoid future delays Respondents are encouraged to attempt telephone contact with witness's counsel, if known, prior to noticing depositions, in order to arrange a mutually convenient time and place for deposition. If such cannot be obtained, then a request for a subpoena with attending statement, describing attempts to schedule the deposition and reason(s) why such attempt was unsuccessful, shall be submitted to the

undersigned for consideration. Any other course of action that results in further delays of completing discovery will be dealt with expediently. Accordingly,

IT IS ORDERED that Respondents, in accordance with the instructions above, attempt to reschedule the depositions of witnesses Longoria and Keeling.

IT IS FURTHER ORDERED that Respondents supply, within thirty days of the date of this Order, the authority for the Secretary of Labor to impose the compensatory sanctions that they seek in their Motion to Compel. Cases involving the authority of a United States District Court to impose monetary sanctions, without further implementing statutes or regulations, create no authority for me to impose such sanctions.

The regulations at 29 C.F.R. Part 18 are generally applicable to adjudicatory proceedings before the office of Administrative Law Judges. 29 C.F.R. § 18.1(a). Therefore, where the applicable regulations at 29 C.F.R. Part 24 are incomplete, Part 18 may be referenced. Although these regulations provide for sanctions against parties or agents of parties, there is nothing to indicate their design for application against non-parties and their counsel. *See* 29 C.F.R. § 18.6(d)(2). Additionally, while the Administrative Law Judge may take any action authorized by the Administrative Procedure

---

Act, 29 C.F.R. § 18.29(a)(6), power to enforce sanctions against subpoenaed non-party witnesses lies with the appropriate district court. 29 C.F.R. § 18.24(d). Finally, the Rules of Civil Practice and Procedure for the District Courts (The Federal Rules of Civil Procedure) are applicable to any situation not provided for or controlled by the regulations. 29 C.F.R. § 18.1(a). The regulations, however, stated immediately heretofore, address the issue of sanctions for subpoenaed witnesses. Therefore, it is unnecessary to apply the Federal Rules of Civil Procedure.

Upon Respondents, submission of sufficient authority for the imposition of compensatory sanctions, I will consider their request for such. A copy of their submissions, if any, shall be served upon Mr. Leibowitz who shall have five days from receipt thereof in which to respond.

At Washington, D.C. Entered: April 23, 1992

by:
JAMES GUILL
Associate Chief Judge